BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JENNIFER WEST	)	
Claimant	)	
	)	
VS.	)	
	)	
GOODWILL INDUSTRIES	)	
Respondent	)	Docket No. 1,044,799
	)	
AND	)	
	)	
FIRSTCOMP INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the October 21, 2009, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Joseph Seiwert, of Wichita, Kansas, appeared for claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant's left shoulder injury of June 9, 2009, was a direct and natural result of her work-related right-knee injury of February 20, 2009. Accordingly, the ALJ ordered all medical paid by respondent, and Dr. Bernard Hearon was ordered to be claimant's authorized treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 20, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of the ALJ's finding that claimant's left shoulder injury was a direct and natural consequence of her original injury of February 20, 2009. Respondent argues that claimant's shoulder injury was the result of her tripping on a step at her home and was not caused by her right knee giving out and causing her to fall.

Respondent requests the Board to reverse the ALJ's October 21, 2009, preliminary hearing Order.

Claimant argues that her left shoulder injury of June 9, 2009, was directly caused by her right leg giving out because of her previous work-related injury to her right knee. Claimant contends, therefore, that her left shoulder injury is compensable as a direct and natural consequence of her original injury and requests the Board to affirm the ALJ's preliminary hearing Order.

The issue for the Board's review is: Was claimant's left shoulder injury of June 9, 2009, a direct and natural consequence of her original work-related injury?

FINDINGS OF FACT

Claimant has a master's degree in social work and was employed by respondent as a case manager. She was originally injured on February 20, 2009, when she tripped on an uneven sidewalk and fell, injuring her right wrist, hip and knee. She was treated conservatively by Dr. Kenneth Jansson for her right knee injury. She had physical therapy and was given a brace for her knee. Claimant told Dr. Jansson on May 20, 2009, that she had a problem with the instability of her knee only when it came to climbing stairs. Claimant said that no doctor has checked her knee and told her that her knee was unstable.

Claimant had a subsequent accident on June 9, 2009. She stated that she was outside her home and stepped up onto the step on her front porch when her right knee gave out and she tripped. She was wearing the brace on her right knee at the time. She fell, and her left shoulder hit the corner of the brick from her door. As a result of her fall, she fractured her left greater tuberosity and humerus bone. She also re-injured her right knee in the fall.

After she fell, claimant went to the emergency room, where she reported that she had tripped over a step. X-rays were taken, and a splint was put on her left arm and shoulder. She admits she had no medical records from the June 2009 fall that indicate that her leg gave out on her, causing her to fall. She had surgery on June 19, 2009, performed by Dr. Hearon, where a plate and six screws were placed in her left shoulder.

Claimant saw Dr. Jansson on July 1, 2009, to follow-up on her right knee treatment. At that time, she complained of instability or a feeling that her right knee was going to give out. Her right knee still had some swelling and bruising from the fall on June 9. Upon examination, however, Dr. Jansson found that claimant had "excellent stability to AP and varus-valgus testing."[1]

[1] P.H. Trans., Cl. Ex. 1 at 6.

Claimant testified that she had no incidents of falling down because of her knee giving out from February 20, to June 9, 2009, although she had some instability during that period.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[2] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[3] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

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[2] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[3] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

In *Gillig,*[4] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[5] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[6]

In *Logsdon*,[7] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[9]

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[4] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[5] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[6] *Id.* at 728.

[7] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

[8] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[9] K.S.A. 2008 Supp. 44-555c(k).

ANALYSIS

Claimant's accident and injury on February 20, 2009, is not disputed by respondent. What respondent does dispute, however, is whether claimant's fall on June 9, 2009, resulted from her injured right knee giving out or whether, instead, it resulted from claimant simply tripping for reasons unrelated to her right knee injury. If claimant's fall resulted from her right knee giving out, then claimant's new left upper extremity and right knee injuries are compensable as a direct and natural consequence of her original work related right knee injury. But if claimant's fall resulted from her simply tripping, then her new injuries are not compensable.

Respondent contends that there was no instability in claimant's right knee before her June 9, 2009, trip and fall and, therefore, her right knee did not give way as alleged. In support of this contention, respondent points to the contemporaneous medical records that contain histories of claimant having tripped going up steps but with no mention of her knee giving way. Dr. Jansson's records indicate claimant had excellent stability in her knee, and claimant acknowledged that her right knee had never given out before June 9, 2009.

Dr. Jansson recommended claimant wear a brace due to injury to her PCL. On June 9, 2009, claimant was still under Dr. Jansson's care and was still wearing a brace on her right knee. She contends this was necessary due to ongoing instability in her knee. She reported to Dr. Jansson's assistant both before and after the June 9, 2009, accident that her knee was unstable and she was having problems with stairs.

On July 1, 2009, claimant complained to Dr. Jansson of pain and instability in her right knee. Arthroscopic surgery was discussed as a possible future option if she did not improve. At her August 19, 2009, office visit with Dr. Jansson, he records:

> [Claimant] is back today; she is doing much better with her right knee. [Claimant] is not complaining of any instability and her pain is much improved. She states that for the first time since this injury, she is feeling that her knee may be recovering.[10]

This indicates that after the June 9, 2009, fall, claimant was having problems with her right knee. It does not prove whether claimant was having problems with her right knee immediately before her June 9, 2009, accident. But the records show that claimant did complain of right knee pain to Dr. Jansson's assistant on April 13, 2009, and said her knee "feels like it is going to dislocate" even when she is wearing her knee brace.[11] In addition, on May 20, 2009, which was the last time claimant was in Dr. Jansson's office before her

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[10] P.H. Trans., Cl. Ex. 1 at 2.

[11] *Id.*, Resp. Ex. 1 at 6.

accident of June 9, 2009, she was still complaining of tenderness and of instability with the use of stairs.

Claimant's fall was unwitnessed. Only she knows how and why she fell. Claimant testified that she tripped going up the stairs because her right knee gave out. Her testimony was obviously believed by the ALJ because he awarded benefits. Based upon the record presented to date, this Board Member agrees with the ALJ that claimant's June 9, 2009, fall was the result of her tripping going up steps due to her right knee giving out.

CONCLUSION

Claimant's June 9, 2009, accident and injuries are compensable as being the direct and natural consequence of her February 20, 2009, work-related right knee injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated October 21, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2010.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge